Coming now to Labis Magistrate's Court Arrest Case No. LA. 192 of 1969 I need not deal with that in detail but will only say that there was sufficient evidence to proceed against the accused under section 414 of the Penal Code. The order of the magistrate in that case is also consequently set aside with the direction that the charge be amended to one under section 414 of the Penal Code and the case sent back for retrial.

Retrial ordered.

KIONG MAN v. KISHEN

[O.C.J. (Syed Agil Barakbah J.) September 24, 1970]

[Seremban — Civil Suit No. 79 of 1963]

Land Law — Contract — Sale of land — Claim for specific performance of an agreement — Defence of non est factum — Fraud — Burden of proof.

The plaintiff claimed specific performance of an agreement for the sale by the defendant to him of certain land in Kuala Pilah. The defendant in his defence, alleged that the agreement of sale was not his deed, as he had signed it not knowing the essential nature of the contract. He also alleged that the agreement was obtained from him by fraud on the part of the plaintiff.

Held: on the facts, the defendant had failed to discharge the burden of proving *non est factum* and had also failed to prove fraud, which requires a clear and strict proof.

Cases referred to:-

(1) *Gallie* v. *Lee & Anor.* [1969] 1 All E.R. 1062.

(2) *Thoroughgood's Case* (1582) 2 Co. Rep. 9a.

(3) *Bater* v. *Bater* [1951] P. 35 at p. 37.

(4) *Tan Chye Chew & Anor.* v. *Eastern Mining and Metals Co. Ltd.* [1965] 1 M.L.J. 201.

(5) *Ratna Ammal* v. *Tan Chow Soo* [1967] 1 M.L.J. 296.

(6) *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173 at p. 175.

CIVIL SUIT.

K. D'Cruz for the plaintiff.

N. Ramachandran for the defendant.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff's claim is for specific performance of an agreement in writing entered into between him and the defendant dated 1st of July, 1960, for the sale by the defendant to the plaintiff of certain land comprised in E.M.R. 459 Lot No. 1174 situated in the mukim of Pilah, in the District of Kuala Pilah, Negri Sembilan, measuring approximately 2 acres. The plaintiff claimed as alternative relief damages for breach of contract and as further alternative relief for recission of the said contract and repayment of the deposit of $2,000 paid thereunder with interest at 6% per annum from the first day of July, 1960, until date of realisation, and for a declaration that the plaintiff is entitled to a lien on the said property for his deposit together with interest and damages and costs.

The defendant admits having signed the document dated 1st July, 1960, but avers that he did so in the belief that he was signing an agreement for a lease of a portion of his land, that he did not know what he was signing and that he did not sign an agreement or any document other than an agreement for a lease. Secondly, that he was induced to sign the said agreement by fraudulent representation of the plaintiff who well knew that such representation was false.

There are therefore two main issues of law involved. In the first place, the defendant pleads that the said document was not his deed and that he signed it not knowing the essential nature of the contract and was mistaken as to its contents. In other words, he pleads *non est factum*. Secondly, he alleges that the agreement was obtained from him by fraud on the part of the plaintiff.

The legal effect in a case of this nature is dealt with at great length by Lord Denning in the Court of Appeal of England in *Gallie* v. *Lee & Anor.*,[1] where at page 1066 he said: —

> "The case thus raises the important question: What is the effect in law when a man signs a deed, or a contract, or other legal document without reading it; and afterwards it turns out to be an entirely different transaction from what he thought it was? He says that he was induced to sign the document by the fraud of another, or, at any rate, that he was under a fundamental mistake about it. So he comes to the court and claims that he is not bound by it.
>
> In such a case, the legal effect is one of two: *Either* the deed is not his deed at all (*non est factum*): *Or* it is his deed, but it was induced by fraud or mistake (*fraud or mistake*)."

His Lordship went on to explain the difference and continued thus: —

> "There is a great difference between the two. If the deed was not his deed at all, (*non est factum*) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document. On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (*fraud or mistake*), the document is not a nullity at all. It is not void *ab initio*. It is only voidable; and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake."

In the present case the defendant is relying on both pleas. The distinction between the two is subtle and Lord Denning explained it in the same case (at page 1067) as follows: —

> "The most favoured distinction is this: If the man was mistaken as to the *class and character* to which the transaction belonged, that is to say, as to the essential nature of the transaction, it is not his document and he can rely on *non est factum*. If he was aware of its essential nature, but only mistaken as to the *contents* of the document, it is his document and he can only rely on *fraud or mistake*."

In the case under discussion, Lord Denning did not favour this distinction as being sensible on the grounds that a mistake as to contents may be just as fundamental as a mistake as to class and character His Lordship gave several illustrations in support of

his views. Salmond L.J. in his judgment in the same court, while agreeing with the principles expounded by Lord Denning, was of the view that the Court of Appeal was bound by its own previous decisions and he had no power to adopt Lord Denning's conclusion but to accept the law as stated in the authorities to which he had referred "in spite of the fact that it results too often in inconsistency, injustice and an affront to common sense." His Lordship was confident that Lord Denning's conclusion would be adopted by the House of Lords were this question to come before it for decision.

The next question is whether both the pleas of *non est factum* and fraud are open for the defendant to raise is explained in the words of Salmon L.J. at page 1077: —

"If a man setting up the plea (of *non est factum*) could prove that he had, without negligence, been induced to sign a contract or deed by a misrepresentation as to its class and character, then the deed or contract was —

'... invalid not merely on the ground of fraud ... but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign and therefore in contemplation of law never did sign the contract to which his name is appended.'"

Further, at page 1079, he continued: —

"Whatever may be the true limits to which the doctrine of *non est factum*, as stated in *Thoroughgood's Case*,[2] was extended in the nineteenth century, the plea has never yet been held available to anyone unless he was able to show that, had he known the true character or class of the document in question, he would not have signed it. Moreover, in every reported case, save one, in which the plea has succeeded, the party relying on it has proved that he was induced to sign by a fraudulent misrepresentation of the document's true character or class. ... It may be that logically there is no reason why the relevant mistake should have to be induced by fraud to be effective for the purpose of a plea of *non est factum* ...."

In my view, taking into consideration the principles discussed above, both pleas ought to be available to the defendant.

What is then the standard of evidence required of the defendant to discharge the burden of proof that is laid down by law of the plea of *non est factum*? I think the law requires strong and clear evidence for its discharge. The defendant has to prove that had he known the class and character of the document in question, he would not have signed it.

As regards the second issue, it is a well-known rule of law that if a party alleges that the contract was obtained from him by fraud, the burden of proving the fraud lies on him. What must the defendant do in this case in order to establish fraud? In the words of Denning L.J. (as he then was) in *Bater* v. *Bater*[3] "A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established". The *onus probandi* is upon him to prove his case as it is alleged in the statement of claim or in his particulars. Nothing short of wilful misrepresentation intended fraudulently to deprive a man of his property must be proved. Every material step necessary for making out a case of fraud must be proved by sufficient evidence. If fraud is not strictly and clearly proved, as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. Fraud will not be carried by way of relief one title beyond the manner in which it is proved to the satisfaction of the court. (See *Kerr* on Fraud and Mistake, 7th Edition, page 669). A high standard of proof is therefore required in cases where fraud is alleged. This principle was accepted by a strong Federal Court in *Tan Chye Chew & Anor.* v. *Eastern Mining & Metals Co. Ltd.*[4] and in the later case of *Ratna Ammal* v. *Tan Chow Soo*[5] by the Federal Court wherein Azmi C.J. (as he then was) quoted Rose C.J. in *Nederlandsche Handel-Maatschappij N.V. (Netherlands Trading Society)* v. *Koh Kim Guan*[6] as follows: -

"Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged."

A high standard or proof means a higher degree of probability.

I will now confine myself to the facts in the present case and apply them to the binding authorities.

It was well established that both the plaintiff and the defendant could not read or write English and that the agreement for sale of the land in dispute (Ex. P1) was prepared by a Eurasian petition writer at Kuala Pilah on the 1st day of July, 1960. The document was signed by both the plaintiff and the defendant and witnessed by one Lau Yap. The petition writer could no longer be traced but Lau Yap was finally traced and made available by the plaintiff before the close of the case, but by consent of both parties he was not called to give evidence. The agreement reads as follows: —

"This agreement made and entered into at Kuala Pilah between Kishen Singh of Tebat Kering, K. Pilah (hereinafter called the 1st party) of the one part and Kiong Man, I/C NS. 005624 of Tampin Road, K. Pilah (hereinafter called the 2nd party) of the other part.

Whereas the 1st party is the registered owner of that one piece of land held under E.M.R. No. 495 Lot 1174 in the mukim of Pilah in the district of Kuala Pilah and whereas the 1st party has agreed to sell and the 2nd party has agreed to purchase the whole said land for the sum of dollars four thousand ($4,000) only together with all the buildings thereon, on the terms and conditions hereinafter contained.

This Agreement witnesseth as follows:—

1. In consideration of the sum of dollars two thousand ($2,000) only paid to the 1st party by the 2nd party this day, the receipt of which said sum, the 1st party hereby acknowledges on the signing hereof, that therefore, remaining a balance sum of $2,000 by way of purchase money, shall be paid as mutually agreed as soon as the 2nd party shall be in a position to do — this term is agreed between the parties herein as a very important term.

2. As soon as the 2nd party shall have the means to settle the balance purchase money, the 1st party shall forthwith accept the sum and execute a proper and registrable transfer of the whole said land into the name of the 2nd party free from all encumbrances.

3. It is hereby agreed that the 2nd party shall be at liberty to enter possession of the said land and put up any type of buildings as he likes either for his own use or for rental purposes — the 1st party shall have no right to stop the 2nd party from doing so.

4. The 1st party shall be held liable to pay damages if he fails to carry out the requirements of this agreement.

5. This agreement binds the heirs, executors, administrators or assigns of the parties herein.

In witness hereof we have hereunto set our hands at Kuala Pilah this 1st day of July 1960."

According to the plaintiff, the said agreement was read back and the meaning was explained to both the defendant and himself by the petition writer after it was prepared. After the defendant had spoken to the petition writer, both he and the defendant put their signatures on it in the presence of the two witnesses, i.e. Lau Yap and the petition writer. The defendant put his signature first and then the plaintiff. Two sheets of paper were signed. He paid the defendant $2,000 on the same day. He further said no one exercised any pressure, force or inducement on the defendant when he signed the agreement. Later he requested the defendant to execute the transfer but the defendant refused telling the plaintiff that he (the defendant) would not accept the agreement. Sometime in June, 1963, the plaintiff through a solicitor, Mr. Muttu-Ramalingam, sent a written demand for transfer by A. R. registered post to the defendant requesting him to attend the solicitor's office to collect the balance of $2,000. (Exhibits P2 and P3 produced). The defendant again refused to execute the transfer. Sometime in the same month he lodged a *caveat* against the transfer charge or lease of the land with the Collector of Land Revenue, Kuala Pilah (Ex. P4). The plaintiff further stated earlier in June, 1960, about one month before the execution of the said agreement, he and the defendant entered into an agreement for the lease of one chain by one chain of the same piece of land for the purpose of enabling the plaintiff to construct a dwelling house thereon. The lease was for an indefinite period commencing from the date of approval of a housing plan by the Town Council and the agreed annual rental was five dollars. (Ex. P6). About one month later they entered into the agreement for sale (Ex. P1) and it was the defendant who requested the petition writer to prepare the said agreement.

In cross-examination the plaintiff stated that he had known the defendant before and about twelve years ago he and a friend jointly purchased from the defendant two pieces of land about 28 acres in area also in Kuala Pilah for the sum of $14,000. An agreement was executed between them (Ex. P5). He had since disposed of the said land and made a profit after tapping on it for about two years.

The defendant who was 85 years old stated that he and his family have been living on the said land since 1913. He claimed that the plaintiff had worked for him as a rubber tapper for about four to five years previous to the alleged transaction. He remembered that sometime in 1960, the plaintiff came and asked for his permission to build a house on a portion of the said land. Since the plaintiff had been working for him the defendant agreed to the plaintiff's request. The defendant further stated that he would not charge any rent but that the plaintiff had to dismantle the house when he wanted him to leave the said land. According to the defendant, the plantiff accepted these conditions and thereafter he (the plaintiff) prepared two copies of the agreement and had them signed by the defendant. After the contents of the document (Ex. P1) were read over to him, the defendant admitted having signed it. However, he denied that he knew the contents, maintaining that he had never at any time agreed to sell the said land. He explained that there was no reason for him to dispose of the land since he and his family had been occupying it all along and he wanted to die there. He alleged that the said document was prepared by the petition writer in collusion with the plaintiff and he had signed it by mistake in the belief that he was allowing the plaintiff to build a house thereon. He was not aware that he was signing for the sale of land and he had no intention of selling it to the plaintiff. In cross-examination he maintained that Exhibit P1 was not signed by him and the plaintiff in the presence of the petition writer and one other witness but that two copies were brought to him in his house by the plaintiff and he signed them. He also denied that the contents thereof were explained by the said petition writer to him and that after having understood them he put his signature thereon. He admitted his negligence and that he had been careless in the matter.

During the proceedings I noted that the defendant was very old and so frail that he had to be assisted to the witness box. He was given a chair to sit on in the course of giving his evidence. His eye-sight was bad and he could not identify his own witness whom he claimed to have known for a long time, apart from one or two documents. I also noticed that he was slow in answering questions and was forgetful at times. These were obviously because of his old age. Anyway, the transaction in dispute took place about ten years ago when he was much younger. His condition then was best described by his own witness, Mr. Muttu-Ramalingam (D.W.2), an advocate and solicitor, who had practised in Kuala Pilah for the last forty years. He knew the defendant very well as a landed proprietor who had signed some documents in connection with leases for erection of houses previously before him. He said that in 1960 the defendant appeared to be in good health. From his experience with the defendant Mr. Muttu-Ramalingam was of the impression that he was an intelligent man. He was not a fool but the sort of person who would not put his signature on anything unless he knew what it was all about. Everytime that a document was explained to him he would ask further questions to clarify matters before he would put his signature. He was illiterate and would always sign in Punjabi. That he was a businessman and had executed documents in English was admitted by the defendant himself in cross-examination. In 1958 he carried on the business of moneylending and had taken court action for sale of certain land secured by a mortgage for a loan he had advanced to a certain Chinese after the latter had failed to pay up the said loan and subsequently became the owner thereof. In 1960, he had signed a considerable number of documents in English both for loan and land transactions and these documents were explained to him first before he put his signature thereon. He agreed that he would not sign any documents prepared in English

before it was explained to him by someone he trusted. Usually he would go to see D.W.2 for explanation and consultation.

Evidence was also adduced regarding the defendant's very sound financial position in 1960. Ramanathan Chettiar (D.W.3) had known the defendant since 1921. In 1960 D.W.3 was in charge of two money-lending firms, namely, RM.M.S.M. and B.R.A.L.C.T. The defendant, he said, used to give him money for the purpose of lending to others at 6% interest. In December, 1959, the defendant deposited the sum of $46,000 to both firms and by the end of 1960 he had a total sum of $63,400 under D.W.3's control. Two ledger books were produced in support of this. The same witness who claimed to have a vast experience in dealings in rubber lands in Kuala Pilah district testified as to the value of the land in question. He gave comparable prices of rubber land around the area in 1959 and 1960 and valued the land in question at $10,000 per acre without being sub-divided. He agreed in cross-examination however that in 1959 the price of rubber was going down and there were more people then selling rubber lands than buying them. He also agreed that the rubber trees on the defendant's 2½ acre land were old in 1960 and he was not aware whether tapping was being done. In this respect, Mr. Muttu-Ramalingam (D.W.2) who knew the land in question testified that about seven or eight years ago, a piece of land about half an acre in area situated about three hundred yards from the land in dispute was sold for $10,000. It was however vacant land not occupied and probably the only land available for sale at that time. According to him, the price of $10,000 was fair bearing in mind that he had offered the same price. In short, what the defendant tried to convey to the court was that the price of $4,000 for the said land in dispute as shown in the agreement for sale executed between the defendant and the plaintiff was a very low and unreasonable figure.

Now, with regard to the plea of *non est factum*, it appeared that the defendant claimed that he was not only mistaken as to the class and character to which the agreement belonged, but also as to its contents. From his own evidence, he seemed to be under the impression that the plaintiff showed him a document relating to a lease of the said land when it later transpired to be one of an agreement for sale of the said land. Secondly, he alleged that the plaintiff explained the contents to him referring to a lease and he signed it in duplicate because he trusted the plaintiff.

Taking into consideration all the facts and surrounding circumstances from the evidence adduced by the defendant, I am of the view that the defendant has failed to discharge the burden of proving *non est factum* by strong and clear evidence according to the accepted principle of law. In the first place, both the plaintiff and the defendant are illiterate and the documents had to be prepared by a petition writer in the presence of Lau Yap who was later made available. Secondly, there was more than ample evidence from his witness D.W. 2 and the defendant's own admission that he was an extra careful man when dealing with documents written in English. He would not have signed unless he was satisfied with the contents. Thirdly, in his evidence the defendant never mentioned the earlier document for lease which he had signed (Ex. P6) and of which he himself had a copy (Ex. D8). The only thing he said in answer to cross-examination was that he signed it in his house. His allegation that he only signed two copies of Ex. P1 in his house believing it was an agreement for lease of the land in dispute was absurd in the light of the fact that two copies of Ex. P6 which relates to the lease were also signed by him at an earlier date. It would be a different matter if he had signed four copies purporting to be the same document on the same day and he retained only one or even two copies. The fact that he was in a very sound financial position and this land could have fetched a higher price than $4,000 in 1960, may be considered as a possibility but not strong and clear enough evidence to discharge the burden of proving *non est factum* in this case. Similarly, on the second point of proving fraud, the evidence adduced by the defendant did not reach the high standard of proof required. The fact that he was in a sound financial position and the land in question was sold at a low price merely raised suspicions. When considered with his evidence that the document (Ex. P1) was signed by him in his house at the request of the plaintiff without it being read and explained to him by the petition writer and not in the presence of the witness and also other relevant evidence, it is, in my view, insufficient to prove fraud which requires a clear and strict proof. The defendant has therefore failed on both issues.

In the circumstances, I give judgment for the plaintiff with costs. Since the claim by the plaintiff is by way of alternatives, and taking into consideration the low purchase price of the land in the agreement for sale (Ex. P1), and that the defendant is a very old man who would not wish to part with the land on which he had been staying for many years and wishes to die there, I think the alternative prayer (3) would be fair and reasonable. I therefore order that the said agreement for sale be rescinded and the defendant do repay to the plaintiff the sum of $2,000 deposit with interest at 6% per annum with effect from 1st July, 1960. I also order that the plaintiff is entitled to a lien on the said land until the repayment of the amount mentioned above.

Judgment for the plaintiff.

Solicitors: *Joseph & Son; N. Ramachandran.*